CORRESPONDENCE.

THE WEATHERHOLTZ CASE, AGAIN—THE DOWNS CASE CONTRA.

Mr. Editor:

If the opinion expressed by the court in the Weatherholtz case is to prevail (though how it can in the face of its manifest injustice and the general adverse opinion of the bar, I can scarcely perceive), then it would seem that the fault is by no means entirely that of the jury. In a case where the prisoner must be either convicted of murder of the first degree or else acquitted, the jury should not be instructed simply as to what constitutes the different grades of homicide, but should be definitely and distinctly informed that under the proofs they must either convict of murder of the first degree or acquit, and that any compromise verdict is unlawful and practically an acquittal. Such an instruction would enlighten them as to the nature of their duties, while the ordinary instruction may very naturally mislead them.

Certainly the prisoner should have this privilege if he desires to avail himself of it. The right to hang or go scot free may be a very dangerous privilege to ask, but on account of the very natural unwillingness of the jury to shed blood, and because stronger evidence will certainly be asked than in a case not capital, it may at times be very valuable. Let him have this dangerous privilege, if he wishes, but let him not be heard to complain if he very wisely declines it.

Such instructions from the court might do much to minimize the evils resulting from the above construction of the law.

My purpose, however, is to call your attention and that of the bar to an unreported case which has a strong bearing on the subject. It arose before me in the County Court of Loudoun, in September, 1892. One Charles F. Downs (white) was tried for rape upon a negro woman. His guilt was plain, but the woman was a notorious character, and the jury, in an effort to be merciful, very illogically found him guilty of an *attempt* to commit rape, as they might have done, had the facts warranted it, under Code, sec. 4044.

His counsel immediately asked for a new trial, quoting Judge Gunter's decision in the Taylor case, then quite recent, and insisted that he was entitled to his discharge.

The facts were that there was absolutely no proof of an unaccomplished attempt, but everything tended to show an entire accomplishment of his purpose; and so it was certified when the case was taken up.

The court, while much impressed by Judge Gunter's opinion, felt constrained to differ with him, declined to accept the Taylor case as authority, and refused a new trial on the ground that, though the verdict was illogical and the error manifest, yet it was not to the prejudice of the prisoner and he would not be heard to complain of it.

A bill of exceptions, setting forth the facts, was at once taken, and a writ of error was asked from the Circuit Court, but was refused by Judge Keith, then

circuit judge. A writ of error to the Court of Appeals was then applied for, but was refused by Judge Fauntleroy. The writ of error being refused, this case did not become a part of the regular reported decisions of the court, yet the concurrence of Judge Keith and the former Court of Appeals in actually refusing the writ entitles this case to great consideration. If a prisoner guilty of a crime may be illogically convicted by the jury of an attempt, then surely *a fortiori* a conviction of murder of the second degree should not entitle the prisoner to a discharge because the judge thinks him guilty of a greater crime.

RICH'D H. TEBBS,
Judge Loudoun County Court.

Leesburg, Va.

DATE OF SUPPLY LIENS.

Editors of the Register:

In the case of *Va. Devel. Co. v. Crozer &c. Co.*, 90 Va. 126, our Supreme Court decided (see p. 135) that "In the silence of the statute on the subject, the rule of common law applies, which establishes liens in the order of their acquisition, the first in order of time standing first in order of rank."

It is therefore important to determine when these liens are acquired.

Section 2485 of Code, as amended by Acts 1891–2, p. 362, provides: "All persons furnishing supplies to a mining or manufacturing company, necessary to the operation of the same, shall have a prior lien upon the personal property of such company other than that forming a part of its plant to the extent of the money due them for such supplies, and also a lien upon all the estate real and personal of such company, which said last lien, however, upon all such real and personal estate shall be subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale or conveyance, made or executed and duly admitted to record, *prior to the date at which said supplies are furnished.*"

Section 2486, as amended by said Act, provides: "No person shall be entitled to the lien given by the preceding section *unless* he shall, within ninety days after such supplies are furnished, file in the clerk's office . . . a memorandum," &c.

Does not sec. 2485 create the lien upon the furnishing of supplies, and sec. 2436 provide for its defeat unless the memorandum is filed?

It is not apparent that any change in the law in this respect was intended; and the Acts of 1878–79, p. 352, provided: "Any person entitled to the benefit of the lien aforesaid shall *forfeit* the same unless he shall file a memorandum," &c.

The statute does not provide that material men shall not have lien *until* filing; but *unless* he files, &c.

If the statute be construed as only giving a lien from the filing of the memorandum, would it not enable mining and manufacturing companies to create preferences amongst creditors, by notifying those favored of insolvency, so as to enable them to file their liens first, and thus enable such companies to defeat, in a roundabout way, the provisions of sec. 1149 of the Code?

The provision as to docketing judgments, sec. 3570 of the Code, is very similar to the provision as to filing memorandum of lien; and it would seem that the same construction should be put on both. In this connection it must be noted that the